

**Letter of Findings: 04-20160238
Sales and Use Tax
For Tax Years 2013 & 2014**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana catering company does not owe retail sales tax on separately stated food service charges because these amounts are excluded from the definition of gross retail income. Catering company does not owe additional tax for audiovisual equipment rental because it does not bill customers for rental of equipment.

ISSUES

I. Gross Retail Tax - Food Service Charges.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1; Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Lowe's Home Centers, LLC v. Indiana Dep't of State Revenue, 23 N.E.3d 52, 59 (Ind. Tax Ct. 2014); Ind. Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 7 (August 2011); Sales Tax Information Bulletin 41 (January 1, 2014).

Taxpayer protests the Department's imposition of gross retail tax on catering service charges.

II. Gross Retail Tax - Audiovisual Rental Service Charges.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-9-3; [45 IAC 2.2-4-27](#).

Taxpayer protests the imposition of sales tax on audiovisual service charges.

STATEMENT OF FACTS

Taxpayer is a limited liability company that provides banquet services. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer for 2013 and 2014 tax years and issued proposed assessments for additional amounts of sales tax and interest. The Department determined that Taxpayer failed to collect and remit retail sales tax on certain transactions; specifically, the Department concluded that Taxpayer owed retail sales tax on amounts of separately stated service charges on its catering services. The Department also found that Taxpayer failed to collect and remit sales tax on service charges related to the rental of audiovisual and other equipment to its customers. Taxpayer protested the audit's assessment of additional retail sales tax on these service charges. An administrative hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

I. Gross Retail Tax - Food Service Charges.

DISCUSSION

Taxpayer disputes the imposition of retail sales tax on service charges stated on customer invoices for banquet services. Taxpayer entered into contracts with its customers for the service of food at banquets at a location and on equipment provided by Taxpayer. The customers are billed a mandatory 22 percent additional "service charge" for the food service, which is a separately stated charge on customers' invoices.

As an initial matter, the Department notes that all tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Sq. Amoco, Inc. v. Ind. Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007);

Ind. Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. In reviewing a taxpayer's argument, the Indiana Supreme Court has held that when it examines a statute that an agency is "charged with enforcing . . . we defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party." Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Taxpayer, as a registered retail merchant, is responsible for collecting and remitting sales tax on retail transactions. "The retail merchant is required to collect the tax [due on the retail transaction] as [an] agent for the state." IC § 6-2.5-2-1(b). The retail merchant "has a duty to remit Indiana [sales] or use taxes . . . to the department, [to] hold those taxes in trust for the state, and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3(2). Thus, when a retail merchant fails to collect and hold the taxes in trust for the state, the retail merchant is personally liable for the sales tax, interest, and penalties due to the state for those sales.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1 . . . or that is described in any other section of IC § 6-2.5-4." A retail transaction is defined as occurring when a person "acquires tangible personal property . . . and transfers that property to another person for consideration." IC § 6-2.5-4-1(b)(1)-(2). Additionally, IC § 6-2.5-4-1(c)(2) provides that it "does not matter whether the property is transferred . . . alone or in conjunction with other property or services."

Pursuant to IC § 6-2.5-4-1(e), the amount of the retail transaction that is subject to sales and use tax includes "the price of the property transferred" and "**except as provided in subsection (g)**, any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records." (**Emphasis added**).

In the audit report, the Department determined that Taxpayer failed to collect and remit the correct amount of sales tax in its catering transactions and assessed Taxpayer additional sales tax. Taxpayer's invoices include a separately stated, mandatory service charge, and Taxpayer did not collect sales tax on this charge. Taxpayer argues that the service charges are receipts that represent "charges for serving or delivery of food," which are excluded from sales tax under IC § 6-2.5-4-1(g).

IC § 6-2.5-4-1(g) provides:

Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges.

The audit report concluded that the service charges represented recovery of overhead costs and were therefore not separately stated charges for the serving or delivery of food. The audit report, relying in part on Sales Tax Information Bulletin 7 (August 2011), 20110928 Ind. Reg. 045110516NRA ("Information Bulletin 7"), concluded that because Taxpayer's service charge is not voluntary and is not paid out to its employees as gratuity, the charges represented the recovery of overhead costs, including insurance, depreciation and other operational costs. However, at the hearing and as noted in the audit report, Taxpayer explained that the service charges are intended to cover Taxpayer's variable costs incurred in serving food, including labor related to the set-up and take-down of the facilities and food delivery. Taxpayer further explained that its employees are paid a straight hourly wage and do not receive gratuities from the service charges or otherwise.

Information Bulletin 7 states in relevant part:

Gratuities are not taxable when they result from an unsolicited, affirmative action on the part of the customer to reward good service. **Charges for serving food or beverages furnished, prepared, or served for consumption at a location, or on equipment provided by the retail merchant are not subject to sales tax.** However, this exclusion only applies if the charges for the serving are stated separately from the price of the food and/or beverages when the purchaser pays the charge. Charges for delivery of prepared food, whether segregated or not, are subject to sales tax. (**Emphasis added**).

While Information Bulletin 7 does contain the language cited in the audit report with respect to gratuities being non-taxable, Information Bulletin 7 also plainly states, "Charges for serving food or beverages furnished, prepared, or served for consumption at a location, or on equipment provided by the retail merchant are not subject to sales tax," thereby mirroring the language of IC § 6-2.5-4-1(g). In addition, this reading of this statute is further supported by the Department's Sales Tax Information Bulletin 41 (January 2014), 20140129 Ind. Reg. 045140014NRA (Information Bulletin 41) (preceded by Sales Tax Bulletin 41 (September 2010), 20100929 Ind. Reg. 045100600NRA, which was in effect until January 1, 2014), which provides a matrix stating that separately stated charges for serving food and beverages are not subject to sales tax.

Both Information Bulletin 7 and Information Bulletin 41 confirm that the Department did not consider separately stated charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment provided by the retail merchant to constitute gross retail income subject to sales tax. Although the current version of Information Bulletin 41 containing the matrix was not in effect during the first year of Taxpayer's protest, the revision was not a reflection of any changes in the Department's laws or regulations and does not reflect a change in the Department's interpretation of the relevant statutes. Rather, it is a clarification that the Department considered those charges to fall under the provisions of IC § 6-2.5-4-1(g).

Contrary to the audit report's finding, there is no additional qualification in the statute or regulations as to how that income must be utilized by the taxpayer after it is collected in order to be exempt from gross retail income, or that it must be collected as a gratuity in order to be considered a "separately stated charge given for the serving of food." It is well settled that the Department may not add conditions not contained in a statute. The Indiana Tax Court has stated:

The Department has the authority to adopt rules and regulations that enable it to put into effect the purposes of Indiana's sales and use tax statutes, but it may not make rules and regulations inconsistent with the statute[s] which it is administering, it may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.

Lowe's Home Centers, LLC v. Indiana Dep't of State Revenue, 23 N.E.3d 52, 59 (Ind. Tax Ct. 2014) (internal quotes omitted).

The statute plainly states that gross retail income excludes "income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant" so long as those charges are separately stated. IC § 6-2.5-4-1(g). There is nothing in the language of the statute that limits these service charges to gratuities in order to be excluded from gross retail income.

During the protest process, Taxpayer provided copies of customer invoices showing that the 22 percent service charge on food is separately stated on each invoice. Taxpayer has complied with the plain language of IC § 6-2.5-4-1(g) by separately stating charges for the service or delivery of food furnished, prepared and served for consumption at a location and on equipment provided by Taxpayer. Therefore, Taxpayer has met its burden under IC § 6-8.1-5-1(c) of showing that the 22 percent service charges for food service are excluded from Taxpayer's gross retail income and are not subject to sales tax.

FINDING

Taxpayer's protest is sustained.

II. Gross Retail Tax - Audiovisual Rental Service Charges.

DISCUSSION

Taxpayer, as a registered retail merchant, is responsible for collecting and remitting sales tax on retail transactions. IC § 6-2.5-2-1(b); IC § 6-2.5-9-3. Every person engaged in the business of renting or leasing tangible personal property is deemed to be a retail merchant subject to the state gross retail tax, and gross receipts from renting or leasing tangible personal property are subject to tax. [45 IAC 2.2-4-27](#)(b) - (c). The Department's regulation only exempts from tax rental or leasing transactions which would have been exempt in an equivalent sales transaction. [45 IAC 2.2-4-27](#)(a).

Taxpayer protests the assessment of sales tax on a service charge imposed on the rental of audiovisual ("AV")

equipment. The audit report found that Taxpayer offers audiovisual, sound and lighting, specialty staging and exhibition rental services, and that the rental equipment is acquired through a subcontractor. Taxpayer stated during the protest that it does not contract with the audiovisual company as stated in the audit report, nor does it bill customers for AV services. Taxpayer provided copies of customer invoices during the protest process and there were no charges included for AV equipment rental. An entity related to Taxpayer separately bills customers for the AV equipment utilized by customers and charges a 22 percent service charge on these rentals. These two businesses, although related and operating out of the same location, are separate legal entities, and each bills customers for different goods and services. Taxpayer has shown that the audit report improperly included service charges for AV equipment rentals provided by a separate legal entity, and therefore the assessment of additional sales tax on service charges for AV equipment rental was incorrect.

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer's Issue I protest regarding the imposition of sales tax on food service charges is sustained. Taxpayer's Issue II protest regarding the imposition of sales tax on audio visual equipment rental service charges is sustained.

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